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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE TERRITORY OF HAWAII, APPELLANT,
v.
OSAKA MANKICHI.
No. 512.

APPEALED FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE TERRITORY OF HAWAII.

MOTION TO ADVANCE.

This is an appeal by the Territory of Hawaii from an order of the district court of the United States for that Territory discharging the petitioner, Osaka Mankichi, from further imprisonment under a conviction of manslaughter.

The question involved arises under the Constitution of the United States, and is whether, after the adoption of the resolution of annexation of July 7, 1898, and prior to the establishment of the Territorial government on June 14, under the act of April 30, 1900, organizing the Territory, the fifth and sixth amendments to the Constitution were in force in Hawaii, so as to render void all indictments, trials, and convictions in criminal cases under the municipal laws of the Republic of Hawaii, which, under the express provisions of the resolution of annexation, remained in

force until Congress should establish a Territorial government there.

Under the Hawaiian law in force in the islands during the rule of the Republic of Hawaii and of the monarchy which preceded it, the grand jury and petit jury of the Anglo-Saxon system were unknown. Indictments were prepared by the prosecuting officer and certified to by the judge, while an agreement of nine out of twelve petit jurors was sufficient to authorize a verdict in a criminal trial.

The following was the provision relative to indictments:

> The necessary bills of indictment shall be duly prepared by a legal prosecuting officer and be duly presented to the presiding judge of a court before the arraignment of the accused, and such judge shall, after examination, certify upon each bill of indictment whether he finds the same a true bill or not. (Section 616, Penal Laws of 1897.)

And this was the provision regulating verdicts:

> No jury for the trial of any case, civil or criminal, shall be less than twelve in number; but when nine of such jury agree upon a verdict, they may render the same, and such verdict shall be as valid and binding upon the parties as if rendered by all twelve. (Section 1345, Civil Laws of 1897.)

The appellee was indicted pursuant to section 616, above quoted, for murder in the first degree; was tried by a jury of twelve men; was convicted of manslaughter in the first degree, three jurors dissenting,

and was sentenced to imprisonment for the term of twenty years—all occurring after the passage of the resolution of annexation, and before the taking effect of the act providing a government for the Territory.

The position of the government of Hawaii during the transition period that the fifth and sixth amendments of the Constitution of the United States did not operate to change the existing system of penal law was unanimously sustained by the supreme court of Hawaii during that time. (*Republic* v. *Edwards*, 11 Haw., 571; *Republic* v. *Edwards*, 12 Haw., 55; *Peacock* v. *Republic*, 12 Haw., 27.)

The reorganization of the courts, pursuant to the organic act of the Territory, was followed by habeas corpus proceedings to test the validity, under the Constitution of the United States, of these decisions, and of course of all convictions during the transition period. On the same day two opinions of the supreme court of the Territory were filed, one holding that the fifth and sixth amendments took effect on the adoption of the resolution of annexation in 1898; the other that they did not take effect until the organization of the Territory under the organic act in 1900. This conflict was made possible by a provision of the law of Hawaii to the effect that when one of the justices of the supreme court of that Territory is absent or disqualified a circuit court judge or a member of the bar may sit in his place. Chief Justice Frear and Associate Justice Galbraith held opposite views, and in the Marshall case the substitute for Justice Perry, who was absent, concurred with Judge Frear, while in the Edwards case

the substitute for Judge Perry, being another person, concurred with Judge Galbraith.

Marshall, upon being remanded to the jail by the supreme court of the Territory, brought habeas corpus proceedings in the district court of the United States. Judge Estee declined to assume jurisdiction. His opinion intimated a belief at that time that the fifth and sixth amendments did not take effect until the organization of the Territory in 1900.

After this, numerous cases of habeas corpus, including one in behalf of Osaka Mankichi, the appellee herein, were brought before Judge George D. Gear, second judge of the first circuit (Territorial) court. He held that the Constitution of the United States was extended to the islands *in toto* by the resolution of annexation, and that all the convictions during the transition period were void. On appeal, the supreme court of the Territory reversed him, Justice Galbraith dissenting, and the petitioners were remanded to imprisonment at hard labor. A petition for a writ of habeas corpus was then presented in behalf of Osaka Mankichi to Judge Estee, which he granted, having apparently changed the views which he intimated in the Marshall case. From his decision an appeal has been taken by the Territory to this court. Under like circumstances, Judge Gear, since the decision of Judge Estee, has discharged prisoners on habeas corpus, declaring that the decisions of the supreme court of the Territory violate the Constitution of the United States, and are, therefore, not binding on him.

Numerous criminals convicted of the highest crimes known to the law, having thus been discharged on habeas corpus owing to this conflict of authority, have been rearrested by the orders of the attorney-general of Hawaii, indicted by grand juries under the existing penal system, and are now awaiting trial. In most of these cases so much time has elapsed since the commission of the crime and the witnesses are so scattered that it is doubtful whether evidence sufficient to secure a reconviction is obtainable. But if these criminals were retried and reconvictions obtained, the supreme court of the Territory of Hawaii would, as things stand, unquestionably set them aside on the ground that the prior convictions were legal. Owing to this conflict of judicial authority the most dangerous characters will be turned loose on the community in those islands unless the important constitutional question involved is promptly settled by a decision of this court.

For these reasons, it seems to me that this case involves a public question of serious concern, not only to the Territory of Hawaii, but to the United States, which is deeply interested in the punishment of crime there; and I therefore submit that the case ought to be advanced for hearing on such day during the present term as may be convenient to the court.

Notice of this motion has been served on opposing counsel, who is now in Washington.

JOHN K. RICHARDS,
Solicitor-General.

JANUARY 16, 1902.

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